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No. 00-331

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1999

BRENDA HOFHERR,
Petitioner,
vs.
VISTA IRRIGATION DISTRICT,
JOHN AMODEO,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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JURISDICTION

Respondents argue that this Court lacks jurisdiction to review this Petition "inasmuch as the questions presented were not preserved on appeal because Petitioner failed to appeal the District Court's findings that she had not been constructively discharged . . .". (Br. in Opp., p. 1) Whether intentionally or not, Respondents miss the point. Petitioner contends here, as she did below, that she should have been entitled to present evidence of damages consequential to the retaliatory demotion/breach of contract notwithstanding the constructive discharge ruling. Contrary to Respondents' inexplicable assertion that "neither the record nor the decision below raised the questions presented in the Petition," (Br. in Opp., p. 5) this issue was extensively briefed in both the District Court and the Ninth Circuit.[1] It is explicitly addressed in the District Court order on the parties' in limine motions (Pet., App. 1c-5c) and, albeit summarily, in the Ninth Circuit Decision (Pet., App. 6a) The fact that the courts below disagreed with Petitioner's analysis does not render the issue waived.

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[1] On appeal, the damage issue raised herein comprised ten pages of the Brief for Appellant, eleven pages of the Appellee's Brief and seven pages of the Appellant's Reply Brief.

I.
PLAINTIFF SHOULD HAVE BEEN ENTITLED TO PROVE AND RECOVER DAMAGES CONSEQUENTIAL TO HER DEMOTION, INCLUDING POST-RESIGNATION DAMAGES FLOWING FROM HER REASONABLE EFFORTS TO MITIGATE HER DAMAGES

As is discussed above, the question presented here, whether petitioner should have been entitled to present evidence of damages which were consequential to the retaliatory demotion/breach of contract and Petitioner's own efforts to mitigate, was argued extensively on appeal, and is properly before this court. The question is not whether Petitioner was constructively discharged, but whether she should have been precluded from recovering damages which are traditionally available for tortious conduct and which would have been available to her had she quietly "accepted" the wrongful conduct, stayed in the inferior employment and done nothing to mitigate the certain and quantifiable damages to which she was subjected. Petitioner contends that to the extent the existing case law permits a damaged employee to stay and sue and recover damages, but denies recovery of damages to those who quit, mitigate and sue, the law is inconsistent and at odds with long-standing, fundamental tort principles.

Ironically, Respondents cite *Ericson* v. *Playgirl, Inc.* (1977) 73 Cal.App.3d 850, 854, 140 Cal.Rptr. 921 for the proposition that "consequential" damages are damages which are reasonably contemplated by the parties. From this assertion they conclude that Hofherr's "post-quit" damages are not "consequential" damages because the decision to quit was hers. (Br. in Opp., p. 7.) The contention is ironic because *Ericson* strongly supports Petitioner's position. First, the *Ericson* court does not define "consequential damages" arising in tort. Rather, it notes that the action at bar is strictly a breach of contract action and that one of the "consequences" affecting the measure of damages in a contract action is that damages are limited to those losses that might reasonably be contemplated or foreseen by the parties. (Id., p. 854.) The *Ericson* court goes on to analyze actions based strictly on contract damages, and expressly distinguishes the measure of contract damages from the measure of tort damages, which were not at issue in that case. The *Ericson* court states: "[T]he cause of action is for breach of contract and not for a tort . . . Defendant is not charged with committing a civil wrong but merely with failing to keep its promise. . . . . damages for breach of contract differ from damages in tort [citations omitted]; accordingly, tort precedents on the measure of damages have no direct relevancy here." (Id., p. 854 [emph. added].)

Tort damages, in contrast to contract damages, are traditionally not limited to those damages "contemplated" by the parties, but rather, extend to all damages proximately caused by the tortfeasor. In the context of employment law, this includes all tort damages, including consequential damages, flowing from an unlawful act against public policy, such as wrongful termination, retaliation or demotion. (*Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 665-669, 765 P.2d 373; *Smith* v. *Brown-Forman Distillers Corp.* (1987) 196 Cal.App.3d 503, 512-513, 196 Cal.Rptr. 916, California Book of Approved Jury Instructions ("BAJI") 10.43)

The same rule is true under federal law. As this Court stated in *Memphis Community School District* v. *Stachura* (1986) 477 U.S. 299, 305-306, 106 S.Ct. 2537, 91 L.Ed.2d 249, "[w]e have repeatedly noted that 42 U.S.C. § 1983 creates "'a species of tort liability' in favor of persons who are deprived of 'rights, privileges, or immunities secured' to them by the Constitution. [citations omitted] Accordingly, when §1983 plaintiffs seek damages for violation of constitutional rights, the level of damages is ordinarily determined according to the principles derived from the common law of torts." (*Id., 306* [emph. added.])

This Court continued, "damages in tort cases are designed to provide "compensation for the injury caused to plaintiff by defendant's breach of duty. [citations omitted] To that end, compensatory damages may include not only out-of-pocket loss and other monetary harms, but also such injuries as 'impairment of reputation ..., personal humiliation, and mental anguish and suffering.'" (*Id.*, pp. 306-307.)

"Section 1983 allows for an award of consequential damages which the trier of fact may reasonably find based on the evidence." (*Schaefer* v. *Tannian*, (E.D.Mich.1995) 895 F.Supp. 175, 179, citing *Memphis Community School Dist.* v. *Stachura, supra*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986) [emph. added].)

Moreover, mitigation of damages by a tort plaintiff is required under both California and federal law. (See, for example, *Parker* v. *Twentieth Century-Fox* (1970) 3 Cal.3d 176, 181; California BAJI 10.16, *Meyers* v. *City of Cincinnati* (6th Cir., 1994) 14 F.3d 1115, 1119 [Plaintiff has duty to mitigate damages in an action under §1983], Ninth Circuit Manual of Model Jury Instructions 7.03.)

Because the instant action sounds in tort, the reliance of the lower courts and Respondents on *Rochlis* v. *Walt Disney Co.* (1993) 19 Cal.App.4th 201, 23 Cal.Rptr.2d 793 is misplaced. As is discussed in the Petition, and not refuted by the Respondents, *Rochlis*, like *Ericson*, is a breach of contract case, not a tort case. No "post-quit" damages were recoverable in

Rochlis because there had been no breach of contract. The *Rochlis* court never addressed the question presented here, to wit, whether damages consequential to an employer's tortious conduct are recoverable.

Respondents' contention that adoption of Petitioner's argument would allow any employee to "quit, sue and seek to recover all damages flowing from the loss of his or her job, regardless how reasonable or unreasonable the decision to quit" (Br. in Opp., p. 8), displays a fundamental misunderstanding of the argument, feigned or not. Petitioner claims only the right to present evidence of her consequential damages and her reasonable efforts to mitigate those damages. If the jury finds that those damages were not proximately caused by the employer, or that Petitioner's efforts to mitigate were not "reasonable" then it will award no damages or reduced damages accordingly. Thus, the damage theory urged by Petitioner does nothing more than place the questions of proximate cause and damages in the hands of the jury, where they have traditionally always been placed. If Respondents have done nothing wrong then they have nothing to fear. The jury will vindicate them. If, on the other hand, Respondents have violated Petitioner's rights, and if her actions to mitigate her damages were reasonable, then damages should be awarded in accordance with long-standing tort principles.

II.
THE QUESTIONS PRESENTED INCLUDE QUESTIONS OF FEDERAL LAW

42 U.S.C. §1983 provides that a person who, under color of any State, subjects a citizen to the deprivation of rights, privileges or immunities secured by the Constitution, shall be liable to the party injured. The question presented here, which falls squarely within the ambit of this federal statute, is under what circumstances and to what extent will a defendant be "liable" for such conduct.

Respondents are an agency and individual who acted under color of the State of California to deprive petitioner of rights and privileges secured by the United States Constitution, to wit, freedom of speech and association, when they subjected her to wrongful demotion and retaliation in violation of public policy in violation of 42 U.S.C. §1983. The fact that their conduct also violates state law does not in any sense abrogate their concurrent liability under federal law. Indeed, the issue presented does raise an important question of federal (and state) law that has not been, but should be, settled by this Court. (Sup. Ct. Rule 10.)

III.
THE QUESTIONS PRESENTED HAVE FAR-REACHING IMPLICATIONS

Notwithstanding the fact that the underlying Ninth Circuit decision is unpublished, the issue presented by this case, does, in fact, have far-reaching implications. If trial courts and intermediate appellate courts continue to take the position that an employee who quits following a wrongful and retaliatory demotion effected in violation of public policy is precluded from recovering damages which are available to an employee who is wrongfully terminated, then employers will continue the practice of wrongfully demoting, rather than terminating, employees in violation of public policy, knowing that they are almost completely insulated from liability for their wrongful conduct. If the wrongfully demoted employee quits, then she is entitled to no damages. If, on the other hand, the wrongfully demoted employee accepts the inferior employment which a terminated employee would not be required to accept, if she sues the employer, the employer can effectively argue that the employee is entitled to little or no damages because she failed to mitigate her damages as is required under the law. If this is the current state of the law, its creates an unjustified anomaly that effectively leaves wrongfully demoted employees without remedy.

Guidance is needed to resolve the current inconsistency between wrongful discharge cases and wrongful demotion cases and to conclusively establish that a wrongfully demoted employee's efforts to mitigate damages which flow from a wrongful demotion should be analyzed within a tort framework of reasonableness in accordance with fundamental tort principles.

Respectfully submitted,

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